



FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

AUG 1 6 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Winterfox, LLC
c/o National Registered Agents, Inc
879 W Baxter Drive
South Jordan, Utah 84095

RE MUR 5333

Dear Sir or Madam.

On June 30, 2004, the Federal Election Commission found that there is reason to believe Winterfox, LLC violated 2 U.S.C §§ 441b(a), 441a(a)(1)(A) and 441f, provisions of the Federal Election Campaign Act of 1971, as amended ("the Act") The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter Where appropriate, statements should be submitted under oath In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred

Requests for extensions of time will not be routinely granted Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days

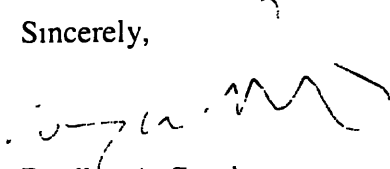
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If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosures
Factual and Legal Analysis
Procedures
Designation of Counsel Form

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT Winterfox, LLC MUR 5333

I. GENERATION OF MATTER

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities See 2 U S C. § 437g(a)(2)

II. FACTUAL AND LEGAL ANALYSIS

A. Available factual information

The available information indicates that political contributions were made by checks drawn on the account of Winterfox, LLC ("Winterfox") to John Swallow for Congress ("Committee"). The contributions were attributed to several contributors, as set forth in the chart below Winterfox is a limited liability company ("LLC") identified in public records as an active LLC organized in Utah.

Check drawn on account	Check date	Amount	Attributed persons (\$1,000 each)
Winterfox, LLC	3/28/02	\$5,000	Evan Bybee, Tamra Bybee, Targe Bybee, Kara Davis, Nical Bybee ¹
Winterfox, LLC	6/28/02	\$5,000	Evan Bybee, Tamra Bybee, Targe Bybee, Nical Bybee, Brenn Bybee ²

¹ The Committee disclosed the receipt of \$1,000 from each Bybee and Ms Davis on March 31, 2002, designated for the Republican party convention

² The Committee disclosed the receipt of \$1,000 from each Bybee on June 26, 2002, designated for the primary election

1 In the first instance, Winterfox wrote a \$5,000 check to the Committee dated March 28,
2 2002, signed by Evan Bybee, with a memo line reading "From Evan, Tamra, Taige, Kara, Nicaïl
3 \$1000 ea," i.e., the four Bybees and Kara Davis. The Committee sent a letter to Winterfox,
4 dated April 4, 2002, expressing thanks for the contribution and then stating

5 The strict Federal Election Commission regulations [prohibit] making contributions on
6 behalf of someone else to federal election campaigns. We must refund this money to you
7 within thirty (30) days unless you can establish in writing that the contribution came from
8 personal funds of a corporate drawing account, such as a draw against salary, wages,
9 dividends, etc. Please confirm that such was indeed the case with this check by signing
10 below...

11
12 The letter provides fields for the signature, occupation, employer and date of each Bybee and of
13 Kara Davis. The completed fields contain signatures, occupations and employers for all five
14 individuals dated April 10 and 11, 2002. One of the five, Tamra Bybee, listed Winterfox as her
15 employer, Taige Bybee and Nicaïl Bybee listed other entities; and Evan Bybee and Kara Davis
16 listed "self." The Committee did not disclose Winterfox as the employer of any of the five
17 individuals.

18 The available information also indicates that Winterfox wrote a \$5,000 check to the
19 Committee dated June 28, 2002, that was signed by Evan Bybee and contained a memo line
20 reading "1,000 ea Evan, Tamra Bybee, Taige Bybee, Nicaïl Bybee, Brenn Bybee," i.e., the four
21 Bybees noted above and Brenn Bybee. The available information does not include any
22 Committee letter regarding the June 28, 2002 Winterfox check.

23 **B. Law on contributions by LLCs, corporations and partnerships**

24 The Commission's regulations establish two possible treatments for contributions by
25 business entities that are recognized as limited liability companies under the laws of the State in
26 which they are established. 11 C.F.R. § 110.1(g)(1). The treatment depends on how the firm
27 elects to file with the Internal Revenue Service ("IRS"). *Id.* at 110.1(g)(2). If the contribution is

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1 from an LLC filing with the IRS as a partnership pursuant to 26 C.F.R. § 301.7701-3, or from
2 one that fails to make an election, it shall be treated as a contribution from a partnership pursuant
3 to 11 C.F.R. § 110.1(e). *Id.* If the contribution is from an LLC electing to file with the IRS as a
4 corporation, the contribution is prohibited. 2 U.S.C. § 441b(a) and 11 C.F.R. § 110.1(g)(3). An
5 LLC that makes a contribution pursuant to this provision shall, at the time it makes the
6 contribution, provide information to the recipient committee as to how the contribution is to be
7 attributed, and affirm to the recipient committee that it is eligible to make the contribution.
8 11 C.F.R. § 110.1(g)(5)

9 The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits
10 corporations from making contributions in connection with any election and prohibits any
11 candidate or political committee from knowingly accepting or receiving any such contributions
12 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any officer or director of any
13 corporation from consenting to any contribution by the corporation. The Commission has
14 recognized, however, limited circumstances in which a corporate employee may make a
15 contribution drawn on a corporate account, specifically, a nonrepayable corporate drawing
16 account established to permit an employee to draw against her salary, profits or other
17 compensation. *See Campaign Guide for Congressional Candidates and Committees* (2002),
18 page 21, *FEC Record*, September 1978, page 1.³ Contributions may not be made from the
19 general treasury fund of corporations. *See* 2 U.S.C. § 441b(a), *cf. FEC v. Massachusetts Citizens*
20 *for Life*, 479 U.S. 238, 241 (1986).

³ The only place in the Act or the Commission’s regulations that specifically addresses the making of contributions through nonrepayable corporate drawing accounts is in the context of contributions to separate segregated funds. *See* 11 C.F.R. § 102.6(c)(3). This regulation provides that a contributor may write a check that represents both a contribution and payment of dues or other fees that must be drawn on the contributor’s personal checking account or on a “non-repayable corporate drawing account of the individual contributor.” *Id.* *See also* Explanation and Justification, 48 Fed. Reg. 26,297 (June 7, 1983).

1 A contribution by a partnership shall be attributed to the partnership and to each partner
2 in one of two ways: 1) in proportion to his or her share of the profits, according to instructions
3 which shall be provided by the partnership to the political committee or candidate, or 2) by
4 agreement of the partners, as long as only the profits of the partners to whom the contribution is
5 attributed are reduced (or losses increased), and these partners' profits are reduced (or losses
6 increased) in proportion to the contribution attributed to each of them 11 C.F.R. § 110.1(e) A
7 contribution by a partnership shall not exceed the Act's limitations on contributions, and no
8 portion of such contribution may be made from the profits of a corporation that is a partner *Id*

9 **C. Analysis of contributions**

10 Winterfox, an LLC, wrote \$10,000 in contribution checks to the Committee Winterfox
11 attributed this amount to Evan Bybee, Tamra Bybee, Taige Bybee, Nicaill Bybee, Kara Davis and
12 Brenn Bybee. No contributions were attributed to the LLC itself The threshold question
13 regarding LLC contributions is whether the LLC is to be treated as a corporation or as a
14 partnership, which depends on whether the LLC elected federal income tax treatment as a
15 corporation. *See* 11 C.F.R. § 110.1(g) The available information does not indicate whether
16 Winterfox elected tax treatment as a corporation

17 The Winterfox checks on their face attribute the contributions among several individuals,
18 but it does not appear that the LLC affirmed to the Committee that it is eligible as an entity to
19 make the contributions in the first place *See* 11 C.F.R. § 110.1(g)(5) Instead, the Committee's
20 letter in response to the first Winterfox contribution check invites the attributed individual
21 contributors to categorize the contributions as coming from "personal funds of a corporate
22 drawing account, such as a draw against salary, wages, dividends, etc." Each individual
23 contributor appeared to agree with this categorization by signing in the space provided While

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1 the Commission permits contributions from corporate employees drawn on nonrepayable
2 corporate drawing accounts, *see supra*, the contributions here do not appear to be drawn on such
3 accounts. First, the checks appear to be drawn on the general treasury account of an LLC; no
4 account name is indicated on the checks relating to a possible nonrepayable drawing account
5 Second, the attributed individual contributors may not even be employees of the LLC. As noted
6 above, only a single attributed contributor listed Winterfox as her employer

7 Thus, if Winterfox has elected federal income tax treatment as a corporation, its
8 contribution checks may constitute impermissible corporate contributions. Therefore, there is
9 reason to believe that Winterfox, LLC violated 2 U.S.C. § 441b(a)

10 If, in the alternative, Winterfox is treated as a partnership, its checks to the Committee
11 constitute contributions from the LLC itself as well as from the “partners” of the LLC. *See*
12 11 C.F.R. § 110.1(e)⁴ Thus, Winterfox, in writing two checks to the Committee in the amounts
13 of \$5,000 each, contributed \$10,000 to the Committee in connection with the convention and
14 primary elections, well in excess of the statutory limit. Therefore, there is reason to believe that
15 Winterfox, LLC violated 2 U.S.C. § 441a(a)(1)(A)

16 Finally, if Winterfox was treated as a corporation, then it made contributions in the names
17 of the various individuals to whom the contributions were attributed. The Act prohibits
18 contributions made in the name of another person. *See* 2 U.S.C. § 441f. Therefore, there is
19 reason to believe that Winterfox, LLC violated 2 U.S.C. § 441f.

⁴ Persons with an ownership interest in an LLC are called “members” rather than “partners.” *See* Utah Revised Limited Liability Company Act, Utah Code Ann. § 48-2c-102(14)